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In the Supreme Court

OF THE

United States

MAY 10 1934
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1933

Nos.

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	37 No. ~~1030~~
ZELLERBACH PAPER COMPANY (a corporation), as Transferee of A. S. Hopkins Company, *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	38 No. ~~1040~~
NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner*, vs. GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent*.	39 No. ~~1041~~

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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Page

Petition for writs of certiorari..... 1

A. Summary statement of the matter involved..... 2

B. Reasons relied on for the allowance of the writs. Prayer for writs 8

Brief in support of petition for writs of certiorari..... 11

I. The opinions of the courts below..... 11

II. Jurisdiction 11

III. Statement of the case..... 12

IV. Specification of errors 13

V. Argument 14

Point A. The Circuit Court of Appeals for the 9th Circuit has rendered a decision clearly in conflict with decisions by courts of coordinate jurisdiction 14

Point B. An important question of federal law has been decided by three Circuit Courts of Appeals, and by the Court of Appeals of the District of Columbia, and has not been, but should be, settled by this court 16

VI. Conclusion 17

Table of Authorities Cited

Cases

Pages

Goldmann, Isaac, Company v. Burnet, 51 Fed. (2d) 427... 7, 15

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163, 43 Sup. Ct. Rep. 531, 532, 67 L. ed. 922, 924.....12, 15, 16

Myles Salt Company v. Commissioner, 49 Fed. (2d) 232.. 7, 15

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587, 49 Sup. Ct. Rep. 17, 73 L. ed. 521.....12, 15

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34, 50 Sup. Ct. Rep. 9, 10, 74 L. ed. 147, 152.....12, 15

Valentine-Clark Co. v. Commissioner, 52 Fed. (2d) 346.... 7, 15

Table of Statutes Cited

Revenue Act of 1918, c. 18, 40 Stat. 1057.....3, 4, 6, 13

Revenue Act of 1921, c. 136, 42 Stat. 227.....3, 4, 5, 6, 13

Revenue Act of 1926, c. 27, 44 Stat. 9..... 5

Table of Statutes Printed in Appendix

Page

Revenue Act of 1918, c. 18, 40 Stat. 1057:

Sec. 227(a) i
Sec. 236 i
Sec. 236(c) i
Sec. 239 i
Sec. 240(a) i
Sec. 241(a) i
Sec. 250(d) ii

Revenue Act of 1921, c. 136, 42 Stat. 227:

Sec. 227(a) ii
Sec. 236 ii
Sec. 236(b) iii
Sec. 239(a) ii
Sec. 241(a) ii
Sec. 250(d) iii
Sec. 1400(a) iii

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GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

PETITION FOR WRITS OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition of Zellerbach Paper Company, a corporation, Zellerbach Paper Company, a corporation, as Transferee of A. S. Hopkins Company, and National Paper Products Company, a corporation, for Writs of Certiorari, directed to the Circuit Court of Appeals for the Ninth Circuit, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The controversy herein arises out of additional income and profits taxes claimed by the Commissioner of Internal Revenue from Zellerbach Paper Company, A. S. Hopkins Company (Zellerbach Paper Company, transferee) and National Paper Products Company for the fiscal year ended April 30, 1921.

The three cases, hereinabove noted, were jointly tried before the United States Board of Tax Appeals, and a joint decision against the taxpayers was rendered therein (R. 81, 89, 119).*

Petitions to review the several orders of the Board of Tax Appeals were filed with the Circuit Court of Appeals for the Ninth Circuit. Here also, the three cases were jointly briefed and argued; a joint opinion was rendered (R. 125) but a separate judgment was rendered in each case, affirming the orders of the Board of Tax Appeals.

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*This is a joint Petition by the three Petitioners hereinabove named. All references are to the record in Zellerbach Paper Company v. Commissioner of Internal Revenue, C. C. A. No. 7209, unless otherwise noted.

On July 16, 1921, Zellerbach Paper Company, one of the Petitioners herein, filed a consolidated Income and Profits Tax Return for the fiscal year ended April 30, 1921, with the Collector of Internal Revenue at San Francisco, California, on behalf of itself and its wholly owned subsidiaries, National Paper Products Company (one of the Petitioners herein) and Sanitary Products Corporation, the latter corporation having been operated at a loss. There was included in this return, the income of the A. S. Hopkins Company for the four months period January 1, 1921 to April 30, 1921. Actually, the latter corporation was not affiliated with the Zellerbach Paper Company during the four months period ending April 30, 1921, but was conducted as a mere branch of the parent, and without separate accounting records (R. 111). The small deficiency asserted against the A. S. Hopkins Company (Zellerbach Paper Company, transferee) is on income earned by the A. S. Hopkins Company for the months of November and December, 1920 (R. 112, 113). These minor matters are unimportant, however, and do not have any bearing on the principal question, to-wit, whether the filing of the consolidated return on July 16, 1921, for the fiscal year ended April 30, 1921, set in motion the Statute of Limitations beyond which period the Commissioner could not initiate proceedings to collect additional taxes (see Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 250 (d) thereof; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 250 (d) thereof).

No additional return for the fiscal year ended April 30, 1921, was filed by Zellerbach Paper Company,

National Paper Products Company, Sanitary Products Corporation, or A. S. Hopkins Company (R. 86).

At the time the consolidated return hereinabove referred to was filed, to-wit, on July 16, 1921, the Revenue Act of 1918, c. 18, 40 Stat. 1057, was in effect. Under the provisions of this Act (Section 250 (d) thereof) the time within which the Commissioner could assess additional taxes for the fiscal year in question, in the absence of fraud, was five years after the return was filed. This period was reduced to four years by Section 250 (d) of the 1921 Revenue Act, c. 136, 42 Stat. 227. No fraud was asserted by the Commissioner.

It is obvious, therefore, that ordinarily the four year period within which the Commissioner could institute proceedings to collect additional taxes would have expired July 16, 1925. On February 27, 1925 (prior to the expiration of the four year period) the Zellerbach Paper Company and National Paper Products Company acting on the request of the Commissioner of Internal Revenue, each executed a waiver extending the time within which the Commissioner could assess additional taxes for the fiscal year ended April 30, 1921, to December 31, 1925 (R. 79). No additional waivers were executed, as a result of which, the Petitioners herein contend, the time within which the Commissioner could assess additional taxes expired on December 31, 1925.

At the time of filing the consolidated return by the Zellerbach Paper Company on July 16, 1921, the Revenue Act of 1918, c. 18, 40 Stat. 1057 (Section

236 (c)) provided for a corporate exemption of $2000; where a consolidated return was filed on behalf of affiliated corporations, but one exemption was allowed (Section 240 (a)).

The 1921 Revenue Act, c. 136, 42 Stat. 227, adopted November 23, 1921, eliminated this $2000 exemption where the net income of the corporation (or affiliated corporations) exceeded $25,000 (Sec. 236 (b)). This provision of the 1921 Revenue Act was retroactive to January 1, 1921 (Section 1400 (a)). The net income of the affiliated corporations herein exceeded $25,000, for the period ended April 30, 1921.

The retroactive operation of the 1921 Act as of January 1, 1921, thus had the effect of eliminating one-third of the $2000 exemption claimed by Zellerbach Paper Company and its subsidiaries in their consolidated return filed July 16, 1921, for the fiscal year ending April 30, 1921, i. e., the sum of $666.67, resulting in additional taxes in the sum of $66.67. There were no changes in the 1921 Revenue Act bringing about an increase of the tax due from these taxpayers, other than the elimination of the $2000 exemption as aforesaid.

Under date of May 11, 1928, the Commissioner of Internal Revenue issued, under the provisions of Section 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, so-called deficiency letters to Zellerbach Paper Company (R. 22); to Zellerbach Paper Company, as Transferee of A. S. Hopkins Company (R.—C. C. A. No. 7210, p. 21); and to National Paper Products Company (R.—C. C. A. No. 7211, p. 22).

The parties stipulated the amounts claimed are due unless barred by the Statute of Limitations (R. 82, 83, 84).

The Petitioners claim the right of the Respondent to assess, and collect additional taxes from them, is barred by the provisions of Section 250 (d) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, which provisions were carried forward in subsequent Revenue Acts.

Petitioners further claim that the consolidated return filed July 16, 1921, became the return required under the Revenue Act of 1921, adopted November 23, 1921, and which was retroactive in part to January 1, 1921.

The Respondent claims no returns were filed on behalf of the Zellerbach Paper Company or National Paper Products Company for the fiscal year ended April 30, 1921, under the Revenue Act of 1921, and as a result no Statute of Limitations applies (R. 26; R.—C. C. A. No. 7210, p. 27; R.—C. C. A. No. 7211, p. 27).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

(1) The Circuit Court of Appeals for the Ninth Circuit, has held in the instant cases that an Income and Profits Tax Return filed on July 16, 1921, and in strict conformity with the Revenue Act of 1918 in

effect at that time, did not become a return under the Revenue Act of 1921, adopted in November, 1921, despite the fact that said Act was made retroactive as to the pertinent portions thereof, as of January 1, 1921 (R. 125). As a result of this holding, the Court concluded that the Statute of Limitations did not begin to run on the date the return was filed, to-wit, July 16, 1921, and held the Commissioner's deficiency letters were timely although not issued until May 11, 1928, nearly seven years after the filing of the return.

The decision of the Circuit Court of Appeals for the Ninth Circuit on the above questions is in direct conflict with decisions on the same questions by the Circuit Court of Appeals for the Fifth Circuit in *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232, and by the Circuit Court of Appeals for the Eighth Circuit in *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346; and by the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The majority opinion of the United States Board of Tax Appeals in the instant cases, recognized the applicability of the three cases hereinabove referred to, but refused to follow them (R. 89).

The dissenting opinion of the Board of Tax Appeals also recognized the applicability of the above cases and stated they should be followed (R. 90).

The opinion by the Circuit Court of Appeals for the Ninth Circuit in the instant cases, also recognized the

questions involved in the three cases above referred to were the same as here (R. 127). In fact, the Circuit Court of Appeals stated in its opinion in the companion cases in which a separate Petition is being filed for Writs of Certiorari as follows:

> "We wish to make it clear that unless we are correct in holding that the decisions of our coordinate courts are erroneous this case as well as the companion case should be reversed."

(See *National Paper Products Company, a Corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent,* C. C. A. 9, No. 7140, p. 94, at 111, in which case a Petition for Writ of Certiorari is being concurrently filed herein.)

(2) An additional reason why the Writs of Certiorari should be granted is that an important question of Federal law has been decided by Circuit Courts of Appeals, for three different circuits, and by the Court of Appeals of the District of Columbia, and has not been, but should be, settled by this Court.

Wherefore, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of the records and proceedings in the cases numbered and entitled on its docket, No. 7209, Zellerbach Paper Company, a corporation, Petitioner, v. Guy T. Helvering as Commissioner of Internal Revenue, Respondent; No. 7210,

Zellerbach Paper Company, a corporation, as Transferee of A. S. Hopkins Company, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent; No. 7211, National Paper Products Company, a corporation, Petitioner v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, and that the said judgments and each of them of the said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

Dated, San Francisco, California,
May 4, 1934.

ZELLERBACH PAPER COMPANY,
ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company,
NATIONAL PAPER PRODUCTS COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

As heretofore pointed out (in the Petition for Writs of Certiorari), the Circuit Court of Appeals for the Ninth Circuit rendered a joint opinion in the three cases herein on February 28, 1934. This opinion has not been reported. It is printed in the Record, beginning at page 125.

A joint opinion (and a joint dissenting opinion) were also rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, Sec. 347; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

2. Although a joint opinion was rendered, separate judgments were filed in the several cases. See Zellerbach Paper Company v. Helvering, C. C. A. No. 7209 at page 142; Zellerbach Paper Company as Transferee of A. S. Hopkins Company v. Helvering, C. C. A. No. 7210 at page 94; National Paper Products Company v. Helvering, C. C. A. No. 7211, at page 94.

3. As heretofore pointed out in our Petition for Writs of Certiorari and under the heading, Reasons

Relied on for the Allowance of the Writs (see page 6 supra), there is a clear conflict between the decisions of the Circuit Court of Appeals for the Ninth Circuit in the instant case and other Courts of coordinate jurisdiction. Supreme Court Rule No. 38, subdivision 5 (b) provides for the granting of a Petition for Certiorari within the discretion of this Court, where such conflict exists.

4. In the following cases Petitions for Writs of Certiorari were granted where a conflict between different Circuit Courts of Appeals existed:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. Ed. 521; and see

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. Ed. 147, 152.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the Petition (pages 2 to 6 inclusive), and in the interest of brevity, the statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

A. The Court erred in finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations. Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 250 (d) thereof; Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 250 (d) thereof.

B. The Court erred in finding and holding that the Income and Profits Tax Return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, and in strict conformity with the Revenue Act of 1918, did not set the Statute of Limitations in motion.

C. The Court erred in finding and holding that the Consolidated Income and Profits Tax Return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921, which Act was retroactive as to the pertinent portions thereof as of January 1, 1921.

D. The Court erred in finding and holding that the Revenue Act of 1921 required the filing of a new Income and Profits Tax Return, which would differ from the return theretofore filed under the Revenue Act of 1918, only by the elimination of a portion of the $2000 exemption.

E. The Court erred in affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company v. Helvering, C. C. A. 9, No. 7209,

which Order found that a deficiency was due from the said Zellerbach Paper Company in the sum of $69,114.02 (R. 94, 142).

F. The Court erred in affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company as Transferee of A. S. Hopkins Company, v. Helvering, C. C. A. 9, No. 7210, which Order found that a deficiency was due from the said Zellerbach Paper Company, as transferee of A. S. Hopkins Company, in the sum of $1744.37 (R. 61, 94).

G. The Court erred in affirming the Order of the United States Board of Tax Appeals in National Paper Products Company v. Helvering, C. C. A. 9, No. 7211, which Order found that a deficiency was due from the said National Paper Products Company in the sum of $32,990.18 (R. 63, 94).

V.

ARGUMENT.

POINT A. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION CLEARLY IN CONFLICT WITH DECISIONS BY COURTS OF COORDINATE JURISDICTION.

We respectfully refer the Court to our Petition for Writs of Certiorari, heading "B"—Reasons Relied on for the Allowance of the Writs (pages 6 to 9). Here we have set forth the questions decided by the Circuit Court of Appeals for the Ninth Circuit, in the instant cases, and have shown the identical questions have been passed upon by the Circuit Courts of Appeals for the Fifth and Eighth Circuits, and by the Court of

Appeals of the District of Columbia, and that a clear conflict exists between these several Courts of co-ordinate jurisdiction. The cases decided contra to the decisions in the instant cases are: *Myles Salt Company v. Commissioner* (1931), 49 Fed. (2d) 232; *Valentine-Clark Company v. Commissioner* (1931), 52 Fed. (2d) 346; and *Isaac Goldmann Company v. Burnet* (1931), 51 Fed. (2d) 427.

The fact that a clear conflict exists is recognized by the United States Board of Tax Appeals in the prevailing opinion (R. 89) and in the dissenting opinion (R. 90) and by the Circuit Court of Appeals for the Ninth Circuit in its own opinion herein (R. 127) and also in the companion cases, where a separate Petition for Writs of Certiorari is being filed (see National Paper Products Company, a corporation, Petitioner, v. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent, C. C. A. 9, No. 7140, pp. 94, 111, being docketed concurrently with the instant cases).

We rely upon Supreme Court Rule 38, subdivision 5 (b) and on the following cases:

Magnum Import Co. v. Coty (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924;

Sanitary Refrigerator Co. v. Winters (1928), 278 U. S. 587; 49 Sup. Ct. Rep. 17; 73 L. Ed. 521; and see

Sanitary Refrigerator Co. v. Winters (1929), 280 U. S. 30, 34; 50 Sup. Ct. Rep. 9, 10; 74 L. Ed. 147, 152.

POINT B. AN IMPORTANT QUESTION OF FEDERAL LAW HAS BEEN DECIDED BY THREE CIRCUIT COURTS OF APPEALS, AND BY THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

Two Circuit Courts of Appeals (the 5th and the 8th) and the Court of Appeals of the District of Columbia have held:

(a) That an Income and Profits Tax Return filed in strict conformity with the Revenue Act of 1918 became the return required under the Revenue Act of 1921, upon the adoption of that Act, which was retroactive in part to January 1, 1921, where no changes in the return were necessary except a new computation occasioned by the elimination of a portion of the corporate exemption allowed by the Revenue Act of 1918; and

(b) That the Statute of Limitations (five years under Section 250 (d) of the 1918 Act and four years under Section 250 (d) of the 1921 Act) was set in motion upon the filing of an Income and Profits Tax Return under the conditions as set forth in subdivision (a), supra.

The Circuit Court of Appeals for the Ninth Circuit, in considering the above questions, has reached exactly the opposite results.

These questions are of great importance not only to the taxpayers, but to the Government itself.

We respectfully submit the conflict should be eliminated and a conformity of decision should be established (see *Magnum Import Co. v. Coty* (1923), 262 U. S. 159, 163; 43 Sup. Ct. Rep. 531, 532; 67 L. Ed. 922, 924).

VI.

CONCLUSION.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers in order that the decisions of the Circuit Court of Appeals for the Ninth Circuit should be made to conform to decisions of Courts of co-ordinate jurisdiction, and that to such an end Writs of Certiorari should be granted and this Court should review the decisions of the Circuit Court of Appeals for the Ninth Circuit and finally reverse them.

Dated, San Francisco, California,
May 4, 1934.

ZELLERBACH PAPER COMPANY,
ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company,
NATIONAL PAPER PRODUCTS COMPANY,
By JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Counsel for Petitioners.

(Appendix Follows.)

Appendix

PERTINENT PARTS OF THE REVENUE ACT OF 1918, c. 18, 40 STAT. 1057.

Sec. 239: That every corporation subject to taxation under this Title * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title. * * *

Sec. 241 (a): That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 227.

Sec. 227(a): That returns shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year then the return shall be made on or before the 15th day of March. * * *

Sec. 240 (a): That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this Title and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return. * * * There shall be allowed in computing the income tax only one specific credit of $2,000 (as provided in section 236); * * *

Sec. 236: That for the purpose only of the tax imposed by Sec. 230 there shall be allowed the following credits:

* * * * * * *

Sec. 236 (c): In case of a domestic corporation, $2000.

Sec. 250 (d): Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

PERTINENT PARTS OF THE REVENUE ACT OF 1921, c. 136, 42 STAT. 227.

Sec. 239 (a): That every corporation subject to taxation under this Title * * * shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title. * * *

Sec. 241(a): That returns of corporations shall be made at the same time as is provided in subdivision (a) of Sec. 227. * * *

Sec. 227 (a): That returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March. * * *

Sec. 236: That for the purpose only of the tax imposed by Section 230 there shall be allowed the following credits:

* * * * * * *

Sec. 236 (b): In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $2000; but if the net income is more than $25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the $2000 credit were allowed, plus the amount of the net income in excess of $25,000.

Sec. 250 (d): The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax, and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax acts, * * * shall be begun after the expiration of five years after the date when such return was filed, * * *.

Sec. 1400 (a): That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b): Title II (called "Income Tax") as of January 1, 1921; Title III (called "War Profits and Excess-Profits Tax") as of January 1, 1921.